BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANA L. BROCKMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,992
BILL JOHNSON, d/b/a BILLS 32 WEST	)	
Respondent/Uninsured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund (Fund) appeals the December 13, 2002 Corrected Award of Administrative Law Judge Robert H. Foerschler. Claimant was awarded a 10 percent permanent partial general disability on a functional basis after the Administrative Law Judge determined that respondent met the minimum payroll requirements of K.S.A. 44-505(a). The Appeals Board (Board) heard oral argument on June 3, 2003. Gary M. Peterson was appointed as Board Member Pro Tem for the purposes of this appeal.

APPEARANCES

Claimant appeared by her attorney, Jack G. O'Connor of Kansas City, Kansas. The Fund appeared by its attorney, Derek R. Chappell of Ottawa, Kansas. The uninsured respondent, represented by Kent O. Docking of Kansas City, Kansas, did not appear at oral argument, but in its submission letter adopted the arguments of the Fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Corrected Award of the Administrative Law Judge.

ISSUES

(1) What is the nature and extent of claimant's injury?

(2) What is claimant's average weekly wage?

(3) Are the parties covered by the Kansas Workers Compensation Act? More particularly, did respondent's payroll exceed the $20,000 limit set forth in K.S.A. 44-505(a)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Corrected Award of the Administrative Law Judge should be affirmed.

The Corrected Award sets out findings of fact and conclusions of law in some detail and it is not necessary to list those herein. The Board adopts the findings and conclusions contained in the Corrected Award as though fully set forth herein.

Claimant worked for respondent as a bartender and had been doing so for approximately two years prior to the April 15, 2001 accident. On that date, claimant fell on wet stairs, injuring her left hand and low back. Claimant was referred to Providence-St. Margaret Health Center for medical treatment after the fall. Claimant was initially treated by Dr. Felts, her primary physician, at which time claimant was having muscle spasms and pain in her low back, right leg and left hand. Claimant was put on bed rest and provided pain killers and muscle relaxants. She missed approximately two weeks of work from respondent. At that time, claimant was also working as office manager at an insurance agency. Claimant missed approximately one week of work from that employment as well.

While being treated by Dr. Felts, claimant was also receiving unauthorized chiropractic care at Harding & Associates. This treatment involved back stretching and electrodes used to massage the back muscles. Claimant was suffering from occasional muscle spasms and occasional numbness in her right foot and right leg.

Prior to claimant's April 15, 2001 fall, she had suffered injuries to the same areas of her body. In 1992, while working for Sentry Security, claimant fell backwards down a 20-foot ravine. This injury resulted in claimant receiving temporary total disability compensation for two years.

Claimant testified that she improved from this previous injury and was receiving no medical treatment prior to the accident in this instance. However, on cross-examination, claimant acknowledged that she had gone to a chiropractor several months before the April 15, 2001 accident, with back complaints.

Claimant was referred by her attorney to P. Brent Koprivica, M.D., for an independent medical examination on April 9, 2002. Dr. Koprivica's deposition was not taken, but his April 9, 2002 report was stipulated into evidence. Also stipulated into evidence at the regular hearing were the worksheet for settlement in Docket No. 183,858 involving the 1992 accident, the March 10, 1995 narrative report of Revis C. Lewis, M.D., and the September 27, 1993 narrative report of Michael J. Poppa, D.O.

Dr. Lewis, in his 1995 report, found claimant had a disc protrusion at L4-L5, with right L5 radiculopathy. There was also narrowing at L5-S1. While surgery was discussed, it was not undertaken, and claimant instead spent several weeks in a pain management program. Dr. Lewis assessed claimant a 20 to 25 percent impairment to the body as a whole based upon her neurological findings and some limitation of motion. She was limited to lifting 10 pounds on a frequent basis and 20 pounds on an occasional basis, and advised to avoid repetitive bending and prolonged standing or sitting.

Dr. Poppa examined claimant on September 16, 1993, issuing a report on September 27, 1993. This examination was scheduled at the request of claimant's then employer, Sentry Security Service. The history provided Dr. Poppa is consistent with that provided to Dr. Lewis. Dr. Poppa assessed claimant a 10 percent impairment to the body as a whole as a result of the resolved lumbar strain, with residual increased muscle tension of the right hip and low back. He restricted claimant to occasional lifting of 20 pounds and frequent lifting of 10 pounds. Neither Dr. Poppa's nor Dr. Lewis's opinions were provided pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

Dr. Koprivica was provided information regarding claimant's current injury, as well as a history of claimant's 1992 fall. Dr. Koprivica diagnosed severe degenerative disc disease at L5-S1, which predated claimant's April 15, 2001 fall. He testified in his opinion and pursuant to the AMA *Guides* (4th ed.), that claimant suffered a 20 percent impairment to the body as a whole, of which 10 percent preexisted the April 15, 2001 fall, with 10 percent being assessed as a result of that work-related injury.

A dispute arose between claimant and her employer, Bill Johnson (owner of Bills 32 West), regarding claimant's average weekly wage. Claimant testified that she was paid at a flat rate, being $50 per day, unless she worked evenings when there was a band or karaoke, at which time she was paid $55 plus bonuses. Bonuses included $5 for every $100 worth of alcohol sold above a certain amount. Claimant testified she made anywhere from $200 to $250 a week, plus bonuses and tips. Claimant testified her tips ran anywhere from $200 to $400 a week, although claimant provided no tax records to verify any of her wage allegations. Claimant testified that the waitresses and bartenders were paid in cash from the cash register and part of her responsibility on a regular basis was to pay not only herself, but also other employees of respondent. Besides bartenders and waitresses,

respondent also employed a "barback" who helped stock the bar on the busiest nights or weekends. Claimant testified the barback was paid $35 a night in cash. Additionally, claimant testified that respondent employed a night maintenance man who was paid anywhere from $6 to $6.50 a night in cash. Claimant alleges, based upon the above information, that respondent's payroll would exceed $20,000 a year, even excluding respondent's family members who also occasionally worked at the bar.

Mr. Johnson testified that claimant, rather than working four to five nights a week as she alleged, only worked one night per week, that being Thursday, and Sunday morning. He testified that the employees would receive a $5 bonus if alcohol sales exceeded $750 on a particular shift. The flat day shift pay was $40, with the night shift being $45, excluding bonuses. He also testified that claimant's assessment of her tips was grossly inflated, as claimant, in his opinion, was not well-liked and would not receive tips anywhere near that which she estimated. He provided a list of the amounts paid,[1] showing a total salary for all non-family employees for the year 2001 of $19,240. That amount included salary paid to an employee named Timmy (whom claimant identified as the maintenance man), Jennifer (another bartender or waitress), and claimant. Mr. Johnson testified that the barbacks were paid no money, but simply were paid in beer. A person named Francois Trapp was used at the bar as a clean-up person and for odd jobs. Mr. Trapp was not a relative of Mr. Johnson's, but no income listings were contained in Fund Exhibit 1 as to what Mr. Trapp may or may not have earned in the year 2001. Mr. Johnson testified that Mr. Trapp simply used Mr. Johnson's automobile in exchange for whatever work activities Mr. Trapp performed at the bar. There was also a dispute regarding whether other employees named Penny Pearson, Susie Williams, Dawn Jackson and Mike Kohlich worked at respondent's bar during the year 2001.

The Administrative Law Judge, in assessing the testimony and credibility of both claimant and respondent, acknowledged that claimant's opinion of her income was grossly inflated, while respondent's opinion of the bar's income was grossly underinflated. In determining that respondent did, indeed, meet the $20,000 limitations of K.S.A. 44-505, the Administrative Law Judge concluded that the truth was somewhere in between.

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
> . . .
> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably

[1] Johnson Depo., Fund Ex. 1.

> estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection . . . .[2]

The Administrative Law Judge determined, and the Board concurs, that Fund Exhibit 1 shows a payroll figure for the year 2001 of $19,240 which is grossly underinflated. Several potential employees and several potential sources of wages were not included in that figure. The Board, therefore, finds that respondent does meet the minimum qualifications of K.S.A. 44-505(a) and the provisions of the Kansas Workers Compensation Act do apply to this matter.

K.S.A. 44-511 defines "wage" as:

> . . . the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

The Administrative Law Judge determined claimant's average weekly wage to be $400 per week, which is somewhere in between claimant's grossly inflated opinion of her wages and the grossly underinflated opinion provided by respondent. The Board finds the opinion of the Administrative Law Judge to be supported by the credible evidence and adopts same as its own.

With regard to the nature and extent of claimant's injury, it should first be noted that there is no allegation that claimant is entitled to any type of work disability under K.S.A. 44-510e. Claimant's present wages with the insurance company, where claimant is office manager, exceed the wages that claimant was earning for respondent. Therefore, as claimant is earning a comparable wage under K.S.A. 44-510e, she is limited to her functional impairment.

The record contains only one opinion from a health care provider regarding claimant's current functional impairment.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American

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[2] K.S.A. 44-505.

> Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[3]

Dr. Koprivica assessed claimant a 20 percent impairment, of which 10 percent relates to the injuries suffered on April 15, 2001.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[4]

The record is uncontradicted that claimant suffered a previous accident in 1992 which resulted in substantial injury. While three opinions regarding the functional impairment suffered by claimant at that time are contained in the record, the opinions of Dr. Lewis and Dr. Poppa are not expressed pursuant to the AMA *Guides* (4th ed.), as is required by statute. Only the opinion of Dr. Koprivica satisfies the requirements of K.S.A. 44-510e. As such, the Board finds the opinion of Dr. Koprivica to be credible and adopts same as its own. As Dr. Koprivica determined that claimant's 20 percent impairment includes 10 percent for the preexisting impairment and 10 percent for the current injury, the Board adopts the opinion of the Administrative Law Judge that claimant's current award should be based upon a 10 percent impairment to the body as a whole, as Dr. Koprivica's opinion does comply with the requirements of K.S.A. 44-510e.[5]

The Board, therefore, finds that the Corrected Award of the Administrative Law Judge of December 13, 2002, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Corrected Award of Administrative Law Judge Robert H. Foerschler dated December 13, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[3] K.S.A. 44-510e.

[4] K.S.A. 44-501(c).

[5] *See also Weickert v. Landoll Corp.*, No. 261,097, 2003 WL 21087634 (Kan. WCAB Apr. 30, 2003).

Dated this ____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jack G. O'Connor, Attorney for Claimant
Kent O. Docking, Attorney for Respondent
Derek R. Chappell, Attorney for the Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Director